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No. 84-1330

In The

Supreme Court of the United States

October Term, 1984

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Respondent,

v.

ROBERT L. ISRAEL, et ux. and
C. WILLIAM BAILEY, et ux.

Defendants.

AMICUS IN SUPPORT OF CERTIORARI

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TABLE OF AUTHORITIES

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Other Authorities

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INTEREST OF AMICUS CURIAE

The Washington Legislature has enunciated a strong state interest in good faith fair dealings by insurance companies. That state interest is reflected not only by the state Insurance Code, Title 48 Revised Code of Washington but also by the state Consumer Protection Act, chapter 19.86 Revised Code of Washington, which is applicable to the payment of insurance claims. Further, the Attorney General of the State of Washington, who here appears as an amicus, is specifically authorized by state law to enforce the Consumer Protection Act.

In furtherance of that state interest, the Attorney General, as amicus, here supports the petition for certiorari.

SPECIFIC PROCEEDING

The petitioner Gould brought suit in state court against two individuals and the Mutual Life Insurance Company of New York for damages as a result of the refusal of the company to pay life insurance proceeds upon the death of her husband. Subsequently, the state trial court dismissed the two individuals which dismissal was thereafter reversed by the Washington State Court of Appeals.

During the interim, while the dismissal was pending in the state appellate court, the federal district court assumed jurisdiction and dismissed the petitioner's action against Mutual Life, which order has been affirmed by the Ninth Circuit.

REASON FOR SUPPORTING CERTIORARI

The amicus supports the petition for certiorari for one overriding reason which is here reflected by two specific issues. The overriding concern is that state courts should have the opportunity to resolve matters of state law. The two specific issues in the instant proceeding are (1) the district court improperly assumed jurisdiction on the basis of diversity, and (2) the federal circuit court misstated state law by relying upon Schroeder v. Royal Globe Insurance Co., 99 Wn.2d 65, 659 P.2d 509 (1983), modified by the withdrawal of Part III, 101 Wn.2d 830, 683 P.2d 186 (1984).

The amicus is very sensitive to Schroeder, supra, because we participated in the request for a modification or removal of Part III of the Schroeder

opinion on the basis that that portion of the opinion did not reflect an accurate statement of state law.

ARGUMENT

The two concerns expressed above by the amicus are intertwined in the current proceedings. If the federal court had not improperly assumed jurisdiction, we would not now be faced with a reported decision of the Ninth Circuit which mistakenly cites the Schroeder case as reflecting Washington state law respecting the standard by which an insurer's liability is to be examined.

JURISDICTIONAL ISSUE

The decisions of this court[1] as

1 Whitcomb v. Smithson, 175 U.S. 635, 637, 20 S.Ct. 248, 44 L.Ed. 303; Kansas City Suburban Belt Ry. Co. v. Herman, 187 U.S. 63, 23 S.Ct. 24, 47 L.Ed. 76; Alabama Great Southern Ry. Co. v. Thompson, 200 U.S. 206, 26 S.Ct. 161, 50 L.Ed. 441; Lathrop v. Interior

well as the decisions of lower federal courts, including the Ninth Circuit,[2] consistently follow the rule that involuntary dismissal of a non-diverse defendant does not create federal jurisdiction, and that the joinder of non-diverse defendants in plaintiff's complaint precluded removal to the federal court.[3] Although 28 U.S.C. § 1447 requires the federal court to remand to the state court when it finds that a case has been improvidently removed, the federal courts here have ignored that

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Coustr. & Imp. Co., 215 U.S. 246, 30 S.Ct. 76, 54 L.Ed. 177; American Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 35 S.Ct. 355, 59 L.Ed. 594; Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713.

2 Self v. General Motors Corp., 588 F.2d 655 (9th Cir. 1978).

3 Moore, Federal Practice, Vol. 1A, § 0.168[3-5] pages 597-598 (1983 ed.)

requirement.

THE SCHROEDER DECISION

The Attorney General of the State of Washington appeared as an amicus in support of a motion for reconsideration of the Consumer Protection Act issue (Part III) of Schroeder v. Royal Globe Insurance Co., 99 Wn.2d 65, 659 P.2d 509 (1983), on the basis that that portion of the opinion misstated the state law on that issue. The Supreme Court subsequently (Schroeder, 101 Wn.2d 830, 683 P.2d 186 (1984)) withdrew that portion of its opinion which dealt with the Consumer Protection Act. This removed the earlier statements from the appellate record and destroyed any precedental value of the same. We are therefore concerned that the Ninth Circuit Court of Appeals in the instant

proceeding by its references and reliance upon the withdrawn portion of Schroeder, supra, gives the impression that the withdrawn portion of the Schroeder decision, to which we objected as an amicus, nevertheless has precedental value. We submit that the enunciation of state law on this issue should be made by the state court rather than by a federal court improperly exercising jurisdiction.

CONCLUSION

It is important to the administration of state law that federal courts recognize jurisdictional limitations and deny removal, or if improvidently removed, remand actions to the state court where the complaint shows on its face that there is a lack of diversity between the plaintiffs and all defendants. The application of that

principle to the instant case would result in a reversal of the federal court actions based on a lack of jurisdiction. Such a reversal would vacate the references to the misstated principles of state law made in the stricken portion of the Schroeder decision, supra.

Respectfully submitted,

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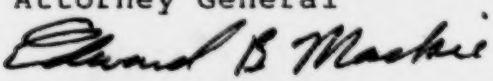
Attorney General



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